

Investor Citizenship and Residence: the EU Commission's Incompetent Case for Blood and Soil

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Today, on 23 January 2019 the Commission released its '[Report on Investor Citizenship and Residence Schemes in the European Union](#).' Given the negative attention the whole issue of selling EU citizenship and residence has been receiving from the powers that be in the European Union, be it the European Parliament or the individual Commissioners from Reading's 'EU citizenship should not be for sale' from several years ago to Jourová's more recent proclamations, lawyers and policy-makers could expect much more from the Commission's treatment of this much inflated, but hugely important topic. Only way under 1% of EU citizenships and residences are investment-based, which the Commission never mentions. The Report, which is clearly a result of a huge log-rolling exercise, will definitely not be entered on the roll-call of the documents the Commission could even vaguely be proud of. Rather than provide a clear rule-based analysis of the forces underlying the moral panic behind the sacredness of belonging offered for sale of which I am a [long-standing bemused observer](#), the Report, regrettably, turns against the key achievements of the Union to misrepresent EU citizenship law in the guise of a 19th-century *Blut und Boden* mystery, as opposed to a modern, globalized forward-looking status. The Union emerging from the pages of the Report is nothing short of Hamsunian, full of 'nature', 'genuine links' and 'real' citizenships, based on long-dead ideals and thus impossibly dull. Given that there is no legal basis in TEU or TFEU for the pursuit of a 'natural' citizenship as it once was – as discussed by [Spiro](#) – it does not come as a surprise that the Commission resorts to obsolete legal authority and abundant flawed legal reasoning to sell the untenable position it has no legal basis to properly defend. One wonders why the legal service did not get a chance to see the document (presumably). Given that the law is straightforward, this could alleviate a lot of embarrassment for outgoing Commissioner Jourová and the Institution as a whole.

The Report is correct on many facts it communicates: indeed, Bulgaria, Cyprus, Malta and, less systematically Austria and potentially other Member States offer EU citizenship for investment. Moreover, Bulgaria, Cyprus, the Czech Republic, Estonia, Greece, Spain, France, Croatia, Ireland, Italy, Lithuania, Luxembourg, Latvia, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia and the UK offer (permanent) residence statuses for investment, which are often convertible into citizenship of those Member States. To summarize: 20 or more (i.e. more than 70% of the) Member States opted for a policy, which the Commission [has no direct competence to regulate](#), but tackles in the Report. This alone makes the Commission's take on investment migration worth looking at in some detail: what is on the Commission's mind?

Framing investment migration uniquely as a risk, rather than an opportunity

Undoubtedly, there is a fundamentally important issue at hand: investment migration is capable of bringing huge gains, but also generate risks. The Commission is dead-silent on the former, presumably deferring to the 70+% of the Member States on this crucial issue, but is absolutely right about mentioning the latter. When ran in non-transparent and corrupt ways investment migration – like any other enterprise – will certainly generate problems. In fact, the Report is such that it presents the whole issue of investment migration uniquely as a risk, rather than an opportunity. In particular, the Commission speaks of the risks regarding ‘security, money-laundering, tax evasion and corruption’.

The fact that 20 Member States market residence, residence leading to citizenship, or citizenship directly, as the Commission correctly reports, makes clear that cost and benefit analysis has been conducted by at least 20 governments, opting to introduce the schemes with the benefits to be reaped in mind. This makes Commission’s view that ‘it difficult to assert that any direct inflows would not have happened without such schemes’ – the *only* reference to the benefits 20 governments try to harness on more than 20 pages of dull but cunning text – somewhat problematic. This could be right for some countries. [Sumption and Hooper](#) have shown, for instance, that UK Tire 1 visas, like the one revoked from Abramovich leading to a loss in a billion investment into a new stadium, a visa type that formally requires buying bonds, do not affect the country’s economic performance. This statement cannot be true for all the 20 jurisdictions, however. Consider applying it to countries requiring a *donation*, like Malta, rather than an investment with its expected return. While with Cyprus, for instance, this could indeed be the case – however doubtful the hypothesis – that, for some reason, even more Russian money would be passing the island without citizenships on offer, in the case of Malta it is absolutely clear that the contributions, which are paid in exchange for citizenship would not, under any circumstances whatsoever, be made without the Malta’s Individual Investment Programme offering the goods, for which the money is paid.

To put it differently, what is ‘difficult to assert’ for the Commission is in fact several per cent of Malta’s GDP and the result of an analysis by 20 Member States of the EU to introduce investment migration programmes in national law. In other words, silence on the benefits the overwhelming majority of the Member States either receives or believes to be receiving unquestionably sheds the Commission’s work in a deeply biased light: the suggestion is that 20 Member States are behaving deeply irrationally, which is implausible and deeply political. Without denying the potential risks, which are rightly pointed out by the Commission, it is nevertheless possible to assert that the aim of the Report is the misrepresentation of investment migration, given that, notwithstanding the fact that the title of the report mentions citizenship and investor residence schemes, it is entirely silent on the *raison d’être* of both, something that should have been, instead, the starting point of any serious analysis.

An incompetent hymn to Blood and Soil

The Commission claims to have discovered what citizenship is about, writing that citizenship 'is traditionally based on ... *ius sanguinis* and ... *ius soli*'. This is all correct, but the Devil, as only so frequently, is in the detail. In giving its 'golden standard', the Commission does not make clear that a) it does not have the power to regulate this area; b) that the reality is much more complex than what its selective summary purports to demonstrate. The combination of the two is extremely problematic, befogging the crucial issue of citizenship acquisition rules to a great degree and enabling the Commission to squeeze in several bizarre claims into the text.

Referring to citizenship by investment the Commission writes that, in essence, such 'citizenship is granted under less stringent conditions than under ordinary naturalization regimes'. What is crucial here is to mention the differences, marking citizenship law of all the Member States to rationally accommodate the acquisition of citizenship by different categories of applicants. Besides, of importance is also the sovereignty aspect of this story. Starting with the latter, states are free to confer citizenship on those whom they consider qualified under the Hague Convention of Nationality (Art. 1) and, unquestionably, under EU law – as [Shaw](#), [myself](#), and, most recently, [Jessurun d'Oliveira](#) and [Sarmiento](#), have demonstrated. By extension this applies to EU citizenship, which is derivative – [ius tractum – citizenship](#). No sane academic voice would be able to argue that the EU has competence to legislate here, which is why the Report is not a legislative proposal and will never be one. As will not be a surprise to the reader, France still decides on who is French and has all the rights to do so, just as Malta on who is Maltese or Finland on who is Finnish. The law is crystal-clear, just as is the fact that all the Member States find the continuation of this approach vital to their interest – which makes the Commission's report look like a poorly-orchestrated attempted power-grab. In establishing any mode of acquisition of citizenship, where the Commission has no say by law, it is impossible to come up with a rigid framework, which the Report purports to have found, but the aspiration is clear. To present Malta, Cyprus, or Bulgaria as breaching the fundamental principles of EU law would be too much: they use their legal competence to naturalize third country nationals in strict accordance with the law. This is exactly why the Commission merely uses a negative tone, instead of explaining what is wrong. The answer is: nothing is wrong and the tone is unacceptable. Consequently, the reasons for mentioning that 'these schemes are explicitly advertised as a means of acquiring EU citizenship' are unclear, since the schemes are *created* to make new EU citizens.

EU law is funny in a way – and this is its unquestionable, [pluralist strength](#). A US kid able to find a Greek great-great grand-father becomes an EU citizen automatically without ever visiting Greece; a spouse of a Frenchman in Vietnam naturalizes without ever living in France, an EU citizen does not need to give up original nationality when naturalizing in Germany, unlike any non-EU nationality holder, and a Catholic dignitary retiring from Vatican becomes an Italian automatically and immediately not under 'less stringent conditions', but because these are the groups,

which are treated by immigration and citizenship law differently in the Member States concerned.

Perusal of any citizenship law book makes as much clear: when we speak about the acquisition of citizenship, differentiated treatment of different cases is key. Member States establish what is desirable and while Italy has decided that asking an ailing Japanese Cardinal, stateless upon retirement from Vatican service, to wait 10 years to become Italian is undesirable replacing it with zero years instead, just as the Dutch government has decided that asking asylum seekers to wait as long as others to naturalize, or the Maltese government, having a significant donation in mind, to drive the economy of the island. In the light of the existing differences supported by numbers, where hundreds of thousands became EU citizens through extremely remote ancestry or other ways having nothing to do with the state or its 'culture' through Bulgaria, Greece, Ireland, Italy, Romania and other states, stating that investment citizenship is 'less stringent' as the Commission does is an absurd misrepresentation.

To push this line home, this is even more absurd at least for two reasons. Most importantly, all other ways to acquire citizenship do not require a significant investment. An American kid, like the son of a Venezuelan friend, searching through archives for any Greek connections not to pay US-rate tuitions at Bologna Medical School is not bringing several millions to Greece. To imply that undying Greekness persists over six generations, however much ethno-nationalist and passé, is a decision for the Greek government to take, which fits the general international trends, as [Joppke](#) has shown. Even political commentators of the left would agree: money seems to be important. So the Cypriot choice to make citizens is at least as (ir)rational as the Greek, but not to a protestor in the '[Macedonia is Greece](#)' crowds of course, which our US kid, thankfully, will never join. The question of what is 'legal' does not arise, since it is not up to the Commission to ask or comment on and given that international law, just as European, is clear: Member States will decide as they see fit: so for Malta EUR 650.000 is more important than nationalism, while for Greece the opposite is true. Some would applaud this choice. To suggest, however, that some other choice is somehow 'less legal' would not be correct. And morality has never played a role in citizenship law, especially in the EU with its colonial past and essentially race-based exclusion from EU citizenship approved by the ECJ in *Kaur*. Globally the picture is no different: citizenship is the main tool for the preservation of global inequality at the moment, as [Milanovic](#) has explained.

Secondly, and equally importantly, 'ordinary conditions' – as opposed to the frowned-upon 'less stringent' ones – imply a level of due diligence, which is significantly lower than what investment citizenship promises: the entirety of one's finances and business connections, as well as all the story of your past would not normally be dug up by independent due diligence providers, unless you are an investor naturalizing on that ground.

This is only right: different applicants require different standards. The absurdity of implying, as the Commission does, that investing several millions and going through deep scrutiny is less stringent than finding a Greek man in the ancestry (citizenship law has traditionally been sexist, of course), whom you have never met, speaks for

itself. This begs the conclusion that the ‘context’ of citizenship acquisition, to which the Commission dedicated a whole section in its Report, is misleading: forgetting to mention ‘difference’ amounts to failing to tell a true story.

Flawed reasoning rooted in obsolete authority

The second main flaw of the Report after misrepresenting investment migration it purports to describe is its failure to come to terms with the basic meaning of citizenship in law as an abstract legal status. Brubaker famously defines citizenship as an ‘object and instrument of closure’, that is: selecting those who ‘belong’ from the available number of bodies and guarding the selected entity from those who do not ‘belong’. It means that not caring about the country and its purported values will not make you less of a citizen in the eyes of the law, just as caring a lot about some officially endorsed ‘culture’ or language will *not* make you a citizen, unless you are named such by law. Pretending that this is not the case – and many countries go to absurd length with this, [like my own Kingdom](#) – is deeply unhelpful.

When the Commission informs us that ‘the study looked at other factors ... which might arguably create a link between the applicant for citizenship and the country concerned’ a citizenship lawyer reading it is puzzled. It is fundamental to realize that only *citizenship* can be such a link. To present citizenship – an abstract legal status – as something that requires more than *itself* in order to be enjoyed is not faithful to the letter and the spirit of global citizenship law as it stands today. Even more, the Commission’s analysis smells of the totalitarianism of 19th century approaches to allegiance.

It is impossible, with recourse to the law in force, to justify the Commission’s position, since it would mean that all what the EU stands for: liberal values, non-discrimination on the basis of nationality, human dignity and equality, is opposable on the basis of clear-cut nationalist tropes of ‘links’ with states and cultures pre-approved by the powers that be. The whole point of the text of the Report is the Commission’s apparent desire to play such a totalitarian role: is this Maltese a ‘real’ Maltese? What if he has never visited the European Union? What about this Irish-woman? This is where the obsolete case-law of the International Court of Justice (!) expressly *overruled* by the EU’s own Court of Justice comes into play: the Commission refers, quite extensively, to *Nottebohm*’s theory of ‘genuine links’.

It is of course the case that the Commission’s file handlers could be unaware of the fact that the case was opposed to immediately after it was decided by Jones, Kunz, Panhuys, Weis – the list of authorities could be continued *ad infinitum* – and later dismissed by de Groot, Jessurun d’Olivera, Macklin, Sloane, Thwaites, Vermeer-Kunzli and many others, as [Spiro](#) has splendidly summarized. What they could not overlook, however, is that ‘genuine links’ are incompatible with a world which is not composed of ‘genuine jails’, what the Court of Justice confirmed in *Micheletti*: as per Advocate General Tesauo, the ‘romantic period of international law’ is over. It is thus quite unacceptable, in the respectful opinion of this author, to provide a reference to ‘genuine links’ and *Nottebohm* in an official Report of the European Commission as a reference to ‘international arena’. The reference is flawed, since

the Court of Justice of the European Union has *expressly prohibited* the Member States from relying on *Nottebohm* in dealing with each other's nationals. The Report contradicts itself, since this fact is mentioned in [footnote 26](#). You cannot have a rule 'in the international arena', which is at the same time expressly prohibited by the highest EU Court, with an immediate effect, of course, of blocking *Nottebohm* in the territory of the EU. This point is absolutely crucial: the Commission's Report knowingly *misrepresents EU law*.

References to the obsolete authority only start the Commission's puzzling campaign of putting legal reasoning to sleep. The Report essentially claims that since checking genuine links is expressly prohibited by EU law in *Micheletti* (mentioned correctly in a footnote), Member States *have to ensure* that such links exist. A *prohibition* is tuned into an *implied obligation*, ladies and gentlemen. In outlawing any such links in *Micheletti* the Court of Justice has apparently instructed someone – in the mind of the Commission – to check whether the 'genuine links' are there. This could not be further from the truth. Quite on the contrary, the Court has in fact clarified that 'genuine links' do not apply in the context of the EU and that *Nottebohm* is bad law: the case-handlers could check a textbook. It is settled case-law that no residence in any of the Member States is required in order for an EU citizens to use free movement rights protected by EU law. The Commission is trying, in its Report, to use precisely the *prohibition* of the checking of the 'genuine links' unequivocally coming directly from the Court of Justice itself as a pretext to imply that there is an obligation to check the existence of such links. [Frankfurt's 'On Bullshit'](#) is at least a philosophical joke, even if only mildly entertaining, while the Commission's text purports to be serious and drive policy decisions. Given that *Nottebohm* unquestionably is bad law and the Commission was *obliged to know it*, and taken into account the reasoning of the Commission, trying to undermine the internal market, established case-law on free movement of persons and the rule of EU law established in *Micheletti* amounts, in fact, to the Commission knowingly misleading the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, to whom the Report is addressed. This could be an example of the violation of the duty of loyalty, should the Report be more convincing.

Curious assumptions about the connection between residence, citizenship and security

It is when looking for the possible solutions for the risks in terms of security, tax evasion and money laundering, however, that the Report reaches a truly esoteric level: the Commission's analysis seems to be based the assumption, which is nowhere explained or defended properly, that presence in one of the Member States for a period of time before naturalization is likely to alleviate some security risks. In fact, numerous recent security threats in the EU were caused by first- or second-generation EU citizens who never claimed to be jetsetters or millionaires. Even moving beyond the fact that residence in an ethnic ghetto could also definitely be residence in a Member State, it is impossible to make a convincing argument that going through one particular naturalization procedure the Commission would have

in mind makes one a less dangerous person. In fact, as long as Maltese billionaires do not stab people at Christmas markets, or ram vans into crowds the assumption entertained by the Commission rests unproven.

This also undermines the appeal of the Commission's findings akin to 'this means that applicants can acquire citizenship of Bulgaria, Cyprus or Malta – and hence EU citizenship – without ever having resided in practice in the Member State.' The only answer is 'Of course!', in a situation where hundreds of thousands of EU citizens have never been to the EU in their lives and there is no legal requirement, either in EU or in International law, to bother to visit one's country of citizenship – not everyone is fond of grandparents' graves. Even moving beyond this obvious reality well-known to the Commission: EU citizenship does not have independent grounds of acquisition. This means that – just as with Greek, or Irish, or French citizenship it would be derived from – it is entirely incorrect to imply that it requires any residence anywhere in particular. What it requires in fact, is the observance of the law – French, or Maltese – democratically passed by the relevant Parliament. Moreover, the continued possession of citizenship is not dependent, unlike the global practice until half a century ago, on residence in any particular territory. EU citizens born in Chicago with this status will remain EU citizens even if they never visit the EU. If they do, no due diligence or security checks will be conducted at all of course. This is the most basic context of how all the citizenships in the world operate: citizenship does not require residence and residence does not mean that someone is less of a threat.

Less important misrepresentation of EU law

Lastly – everywhere throughout the Report the Commission underlines the risks related to the freedom of movement of the new citizens between the Member States after naturalization. There is a problem here. Framing the use of the most important *right* of citizenship under EU law uniquely as a *risk* is not entirely correct. What could be mentioned – following [Kälin](#) – is that all the individuals naturalized via citizenship by investment are in fact ideal EU citizens in the light of Directive 2004/38: they will never be a burden on the social security systems of the host Member States and will obviously have a comprehensive health insurance – the two core requirements to be met in order to benefit from the free movement right under Article 21 TFEU. Also the Report's wording about 'circumventing certain nationality requirements' is unhelpful and is no doubt a misunderstanding: naturalizing by investment makes one a citizen of Malta, i.e. is a vehicle to *meeting the requirement* of nationality. Becoming a citizen – either through marriage to a Dutch lady or serving in the French foreign legion – cannot be equated with circumventing a requirement. Most worrisomely, the Commission seems to hint at discrimination on the basis of the ground of citizenship acquisition, which is prohibited in EU law since C-214/94 *Boukhalfa* case-law, which it does not cite.

Leaving *Boukhalfa*, which is not in all the textbooks anymore aside, the Commission has had problems brushing up on the knowledge of Directive 2003/103 too, it appears, as several Member States are implicitly criticized for establishing an easier way that the requirement of that Directive, to access their *national* Permanent

Residence. This criticism is unacceptable, since Directive 2003/109 states unequivocally in Article 13 that:

“Member States may issue residence permits of permanent or unlimited validity *on terms that are more favourable* than those laid down by this Directive” (emphasis added).

To be absolutely clear: to imply that the Directive establishes the *minimal* threshold of defining permanent residence in the EU – as [Carrera](#) famously has done (p. 18) – is quite incorrect, since the text of the provision above is quite clear. It is of course true that national requirements, which are more lenient than those set out in Directive 2003/109 will not produce EU-level rights for the holders of the permits, the point covered in the literature by [van den Brink](#), but this is not the general point the Report seems to be making. The Report is taking issue, erroneously, with the low physical presence thresholds under the national legislation on investment residence in Malta, Greece and Bulgaria. Once again: this criticism is moot, since the Directive expressly allows the Member States to set the presence requirement at zero (“0”) days. This is the law the Commission is there to respect and uphold. In fact, it is unclear why it is criticizing the decisions legitimately taken by three Member State governments clearly within their realm of competence and breaching no legal rules while showing no evidence whatsoever of any abuse of the law.

Coda

The Commission has proven Harry Frankfurt right: ‘One of the most salient features of our culture is that there is so much bullshit’. It has taken us for a bullshit ride, 19th century style, telling 20 Member States that they most likely do it wrong, while enjoying no competence to regulate the field and demonstrating rather poor command of the matter in question. Many will no doubt be offended by it, while Blood and Soil communitarians of all sorts will cheer. Beyond the haphazard argumentation and willful misinformation concerning citizenship in general and EU citizenship law in particular, the Report sends a very clear message: the Commission wants to regulate citizenship, telling France who is a Frenchman and Estonians who has ‘genuine links’ to Estonia; the Commission – and this is scary, not merely offensive – could believe in ‘genuine links’, ready to sacrifice core principles the EU is based on; and, lastly, the consensus on whether citizenship and residence by investment is actually a problem is entirely missing – otherwise we would have a chance to comment on a serious analysis. Ideology and incompetence have won for now.

The author chairs the Investment Migration Council in Geneva and is the author of ‘Citizenship’ forthcoming with MIT Press this year. Every year the author updates “[Henley and Partners — Kochenov Quality of Nationality Index](#)” measuring the quality of all the nationalities around the world.

(The disclosure statement has been updated, VB)

